80-980

No. _____

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FRANCESCO MICHIENZI AND AUDREY F. MICHIENZI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the trial court deprived the petitioners of their Sixth Amendment right to confront a key prosecution witness against them by restricting the scope of cross-examination of that witness in a manner that is in direct conflict with this Court's decisions in *Alford* v. *United States*, 282 U.S. 687 (1931), and *Smith* v. *Illinois*, 390 U.S. 129 (1968).

2. Whether the judicial misconduct of displaying a personal friendship with a prosecution witness was sufficiently dealt with below by reversal of the conviction on the one count to which the witness testified, ignoring the likelihood that, by enhancing the credibility of that witness, the trial judge denigrated the credibility of the petitioner's exculpatory testimony and thus deprived the petitioners of their right to a fair trial guaranteed by the Due Process Clause of the Fifth Amendment.

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FRANCESCO MICHIENZI AND AUDREY F. MICHIENZI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Francesco Michienzi and Audrey F. Michienzi, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming their conviction in the United States District Court for the Northern District of Ohio on charges of violating 18 U.S.C. §1001 and 18 U.S.C. §1341 in connection with the submission of medicare claims.

OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, is printed in the appendix to this petition.

JURISDICTION

The Court of Appeals filed its opinion and entered judgment against the petitioners on September 12, 1980. A timely petition for rehearing was denied, without opinion, on October 17, 1980. A copy of the order denying the petition for rehearing is printed in the appendix to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioners, Dr. Francesco Michienzi and his wife, Audrey F. Michienzi, a registered nurse who aided him in the operation of his private clinic, were convicted on three "Medicare fraud" counts: as to a patient named Beier, a mail fraud count (18 U.S.C. §1341); and, as to a patient named Darr, a mail fraud count and a false statement count (18 U.S.C. §1001).[1] Each of the petitioners was sentenced to a fine of $1,000 on each of the three counts and to three concurrent five-year terms, six months to be served and the balance suspended.

Both petitioners appealed their convictions to the Court of Appeals for the Sixth Circuit. That court vacated the conviction of both petitioners as to one count because of conduct of the trial judge (described *infra*, p. 7) which "may have lent undue weight to the testimony given by the witness involved." Finding "no reversible error" as to any of the other points raised below, the Court of Appeals affirmed the convictions on the other two counts.

Only two limited areas of the facts of the case need be stated to elucidate fairly the issues here presented.

1. The Limitation Of The Right Of Cross-Examination.

A substantial part of the case was made on the testimony of Rosemary Ging, a former employee of the

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[1] The indictment had charged petitioners with thirty-seven mail fraud counts and sixteen false statement counts. All but fifteen of the counts were dismissed before trial. Those fifteen were submitted to the jury but, on twelve of them, the jury was unable to reach a verdict.

clinic who had quit when professedly she began to appreciate the dishonesty of petitioners' practices and to fear that she might be thought to be involved.[2] The trial court said of her:

> "I recognize that the question of Miss Ging's . . . veracity is a very serious question in this case. . . ." Tr. 672.[3]

In the face of the seriousness of the question of Miss Ging's veracity, the government, notwithstanding the authority of this Court's decision in *Alford* v. *United States*, 282 U.S. 687 (1931), moved *in limine* that the defense be precluded from inquiring on cross-examination where the witness currently resided. The grounds of the government's motion were that where the witness resided at the time of the trial was irrelevant and that she wished to keep that information from the defendants because she feared them. Tr. 664-66. The defense, on the other hand, relied on the *Alford* line of authority that a witness may be cross-examined on current residence as a foundation for evidence of reputation as to veracity, Tr. 707-08, and pointed out that the trial court had already held, at an earlier stage of the proceedings, that Miss Ging had no reasonable basis for her asserted fear of the defendants. Tr. 664. The trial court granted the government's motion upon the grounds that Miss Ging's fear, even if unreasonable, was "the harsh reality" and that her current address was totally irrelevant. Tr. 666. To the defense contention that the ruling

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[2] About two-thirds of the government's discussion of "Deviation from general practices" in its brief in the Court of Appeals (hereinafter cited as "Brief") was based on Miss Ging's testimony. Brief, pp. 4-5.

[3] Citations in this petition to "Tr." refer to the transcript of the petitioners' second trial. The first trial ended in a mistrial.

violated both due process and the right of confrontation, the court replied:

> "You can maintain anything you want in the record. Those are good arguments for the jury. They don't sway me very much." Tr. 667.

To the defense argument that cross-examination as to current residence is necessary as a foundation for reputation evidence, the court made the clearly erroneous reply:

> "We're not concerned with the question of the witness' character in some place where she may have moved to. We're concerned with her character and reputation in the City of Sandusky and County of Erie. . . . But what her reputation is in the community now, whatever that may be, I regard as being irrelevant." Tr. 707.

The clear error of the court's statement is manifest from the court's own correct instruction to the jury:

> "A witness may be discredited or impeached by evidence that the general reputation of the witness for truth and veracity is bad *in the community where the witness now resides*, or has recently resided." Supplemental Appendix, p. 19 (emphasis added).[4]

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[4] The prejudicial effect of the judge's erroneous position may well have been enhanced, moreover, when almost immediately after the quoted sentence in the instructions, the judge added, somewhat ambiguously: "Evidence that the witness' reputation for truth and veracity has not been discussed or, that those traits of the witness' character have not been questioned, may be sufficient to warrant an inference of good reputation as to those traits of character." Supplemental Appendix, p. 19. ("Supplemental Appendix" refers to the Supplemental Appendix filed by the parties with the court below. That appendix contains, for the most part, the trial court's instructions to the jury.)

In the course of the cross-examination of Miss Ging, the government realized that it had inadvertently disclosed her address to the defense by placing it on a subpoena. But it succeeded in preventing the defense from ascertaining from the witness that the address — one in Knoxville, Tennessee — was hers.[5] Tr. 856M. Then, obviously recognizing that the "fear" basis of the court's restrictive ruling had evaporated, the government attempted to supply an alternative basis for the ruling. It suggested that the defense, with the court's permission, could ask the witness when she had moved from Sandusky and that, if she had moved so recently as to preclude the likelihood of having developed any reputation in her new community, the grant of the *in limine* motion would be of no consequence. Tr. 880-81. The court, however, rejected the suggestion, stating:

> "I believe that her reputation that we're concerned with is still the reputation in Sandusky, and not somewhere else, and that if she has a bad reputation for truth and veracity in Sandusky, you can certainly prove it, and the fact that she has moved from Sandusky, even if she moved from there six months ago, wouldn't make a bit of difference in my judgment as to that issue.
>
> "So far as confrontation is concerned, while I'm not much on slogans, so if this witness is being confronted, she's here, you can examine her. But I'm not going to let you, in spite of the Government's suggestion as to what they would or wouldn't object to, I'm not going to let you ask whether she left Sandusky." Tr. 882.

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[5] While thus preventing the defense from establishing that Knoxville, Tennessee, address, as the current address of the witness, the government conceded in its brief below that it was. Making a virtue of necessity, it then argued that the granting of its motion *in limine* was of no consequence, for "they already knew the answer to the address question they sought." Brief, p. 12.

In their appeal below from their conviction, petitioners argued that the trial court's *in limine* restriction of the cross-examination of witness Ging was reversible error under *Alford* v. *United States, supra;* see also, *Smith* v. *Illinois,* 390 U.S. 129, 132-33 (1968); and *Davis* v. *Alaska,* 415 U.S. 308, 318 n.6 (1974). The court below dismissed this argument without discussion, holding merely that it found "no reversible error in the Judge's evidentiary rulings. . . ." App. at 1a.

2. The Misconduct Of The Trial Judge.

Another witness important to the government's case was Edward Beier. While that witness was on the stand, the trial judge, in the view of the jury, rose from his chair, walked to the side of the bench, shook hands with the witness and engaged him in brief conversation. The judge then informed the jury: "Mr. Beier and I are old friends from Norwalk." Tr. 680. Shortly thereafter, notwithstanding that defense counsel had made a point of placing the above facts on the record, the trial court, electing to persist in his unquestionably improper conduct, addressed the witness as "Eddie." Tr. 697.

The defense moved for a mistrial upon the ground that the court's misconduct had lent undue influence to Mr. Beier's testimony. The court, obviously having no perception of the impropriety of its conduct, denied the motion summarily (Tr. 782-83) and went on to state:

> "I should warn counsel that if I find some of the Defendants' witnesses are old friends that I haven't seen for a long time, I shall do the same thing with them." Tr. 783.[6]

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[6] When the last defense witness testified, the judge took the opportunity to fulfill his threat. He shook hands with the witness and

The Court of Appeals held, as to this misconduct of the trial judge:

> "It is clear to us that Mr. Beier's testimony was of great importance to the government's proofs in relation to count one of the indictment upon which defendants were convicted.
>
> "While we recognize that the District Judge's greeting to his old friend was plainly not intended to sway the jury, the episode may have lent undue weight to the testimony given by the witness involved. *See Quercia* v. *United States,* 289 U.S. 466, 470 (1933).
>
> "Under this circumstance, the judgment of conviction as to count one is vacated as to both defendants. The judgments of conviction on the other counts are affirmed." App. at 2a.

Since Dr. Michienzi, testifying in his own and his wife's behalf, had denied guilt on all counts, it is apparent that the judge's misconduct, to the extent that it enhanced the weight of Mr. Beier's testimony of guilt on Count 1, inevitably denigrated Dr. Michienzi's testimony of innocence on the other counts. The Court of Appeals, in reversing only the Count 1 conviction, took no account of this effect of the judge's misconduct.

REASONS FOR GRANTING THE WRIT

1. Almost fifty years ago, this Court held, in *Alford* v. *United States*, 282 U.S. 687 (1931), that it was an abuse of discretion and prejudicial error[7] for a federal

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the prosecutor made sure that the record should so state. Tr. 1609. The record does not disclose, however, that any words were spoken. Nor does it show whether or not the judge actually knew the witness.

[7] Although not specifically articulating in *Alford* the constitutional basis of its decision, the Court, in later applying *Alford* stan-

trial court to cut off *in limine* a criminal defendant's right to inquire on cross-examination as to the place of residence of a prosecution witness.[8] One of the purposes of cross-examination, said the Court, is "that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood. . . ." 282 U.S. at 691. To foreclose any contention that the error of such *in limine* preclusion of cross-examination can be harmless, the Court added:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise the n. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . . In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of

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dards to state court trials, made it plain that it was speaking of the Sixth Amendment right of confrontation. *Smith* v. *Illinois*, 390 U.S. 129, 133 (1968). Also, in *Davis* v. *Alaska*, 415 U.S. 308, 318 n.6 (1974), the Chief Justice, in his opinion for the Court, wrote: "Although *Alford* involved a federal criminal trial and we reversed because of abuse of discretion and prejudicial error, the constitutional dimension of our holding in *Alford* is not in doubt.

[8] For the universal acceptance and continued vitality of the *Alford* principle it is sufficient to refer to the Shepard citator.

harmless testimony. . . ." 282 U.S. at 692 (citations omitted).[9]

In its attempt to avoid *Alford's* impact, the government took three separate paths (Brief, pp. 11-12):

> (a) that *Alford* is distinguishable as dealing with the potential bias of a witness held in federal custody;
>
> (b) that *Alford*, while declaring a right to cross-examine on the question of residence, left the exercise of the right to judicial discretion; and
>
> (c) that denial of such cross-examination was justified here by the witness' fear.

We submit that this Court has effectively blocked all three of those paths.

First, *Alford*, although it did deal with a possibility that the witness was in federal custody, plainly called that "an additional reason why the question should be allowed," 282 U.S. at 693, and, just as plainly, as we have already shown, declared the question allowable without that additional reason and, indeed, without the need to state *any* reason.

For its "discretion" path, the government pointed to the Court's statement, 282 U.S. at 694, that "[t]he ex-

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[9] Moreover, the importance of a proper cross-examination of Rosemary Ging, the witness here involved, could have been no less than that of the witness in *Alford*, for, as the government showed in its brief below, at pp. 4-5, she, like the *Alford* witness, was "a former employee" of the petitioners who, on direct examination, "gave damaging testimony with respect to various transactions of accused, including conversations with the witness when others were not present. . . ."

tent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court." Brief, p. 11. But the Court was there speaking only of the *extent* of cross-examination on the subject.[10] The Court said the trial court "may exercise a reasonable judgment in determining when the subject is exhausted" and has "a duty to protect [the witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him," but may not, as here it did, "cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination." 282 U.S. at 694.

The government's third path — the witness' fear — depends on the gloss placed upon *Alford* by Mr. Justice White's concurring opinion in *Smith* v. *Illinois*, *supra*, 390 U.S. at 133-34. He attributed to the Court an intention to include among the questions disallowable as tending "merely to harass, annoy or humiliate" the witness "those inquiries which tend to endanger the personal safety of the witness."

"But," Mr. Justice White added, "in these situations, if the question asked is one that is normally per-

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[10] Consistently with what this Court said in *Alford*, "the cases . . . recognize that it 'is only after the right of cross-examination has been substantially and thoroughly exercised that the allowance of further cross-examination becomes discretionary with the trial court.' " *United States* v. *Caudle*, 606 F.2d 451, 458 (4th Cir. 1979), *quoting Hartzell* v. *United States*, 72 F.2d 569, 585 (8th Cir. 1934). See also, *United States* v. *Greenberg*, 423 F.2d 1106, 1108 (5th Cir. 1970): "[F]ull cross-examination addressed to a relevant area of inquiry is a right, and the discretion of the court to limit the scope of cross-examination does not become operative until a party has had an opportunity to exercise the right of cross-examination."

missible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question." 390 U.S. at 134. Thus, a professed fear of the witness not shown to be reasonably based will not suffice to defeat the right of cross-examination.[11] What the trial judge must be able to find, if he is to foreclose the question, is not that the witness actually is fearful, but that there is actually something to fear. The finding in this case of a "harsh reality" that Miss Ging felt fear, even if there was no rational basis for her fear (*supra*, p. 4), is simply not enough to overcome petitioners' *Alford* right of cross-examination. Moreover, the government's position that it had already let the address of the witness slip out to the defense seems to remove any "fear" element from the case. Since the trial court, however, did not permit the defense to verify that the revealed address was actually that of the witness and flatly forbade any inquiry into the witness' reputation in that place, the petitioners' *Alford* point remains unaffected.

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[11] See, *United States* v. *Fife*, 573 F.2d 369, 376 (6th Cir. 1976): "The mere expression of apprehension by a witness who is reluctant to divulge his address is not sufficient justification for restricting cross-examination without further inquiry. An *in camera* hearing might be held to determine if there is a factual basis for such apprehension." See also, *United States* v. *Ott*, 489 F.2d 872, 876 (7th Cir. 1973) (per Stevens, J.): "There are occasions, of course, when compelling reasons, such as concern for the safety of a witness, may justify curtailing even this preliminary inquiry. The trial judge has discretion to determine when such reasons exist."And, see, *United States* v. *Cavallaro*, 553 F.2d 300, 304 (2d Cir. 1977): "There was good reason to fear for the safety of the witness; " and, *United States* v. *Alston*, 460 F.2d 48, 52 (5th Cir. 1972): "[T]he district judge . . . concluded . . . that [the witness had] a reasonable fear for his own or his family's physical safety."

There can be no doubt that the trial court's view of the confrontation clause as a mere "slogan" and its ruling that petitioners had no right to elicit evidence of the witness' reputation for veracity in the place where she lived were plainly erroneous and in blatant conflict with this Court's decision in *Alford*. We respectfully submit that this Court should grant certiorari and summarily reverse the judgment of the Court of Appeals affirming the convictions.

2. The impropriety of the judge's exhibition of his friendship with a prosecution witness was recognized by the court below in vacating the convictions as to one count. The question remaining, however, is whether the nature of the misconduct and the posture of the case did not require total reversal.

No principle is more fundamental to our jurisprudence than the principle of fair trial. When a criminal case is tried to a jury, the likeliest way for the trial to become unfair is for the presiding judge to allow the jury to base its verdict on matters other than properly received evidence. The most invidious of such other matters are those which the jury receives from the trial judge himself, for as this Court said in *Starr* v. *United States*, 153 U.S. 614, 626 (1894), and later reiterated in *Quercia* v. *United States*, 289 U.S. 466, 470 (1933):

> "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his slightest word or intimation is received with deference, and may prove controlling."[12]

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[12] The weight of the trial court's position upon the jury has even been called "overpowering." *United States* v. *Hoker*, 483 F.2d 359, 368 (5th Cir. 1973); see also, *United States* v. *Hickman*, 592 F.2d 931, 933 (6th Cir. 1979).

When the judge, worse than merely allowing the jury to base its verdict on some prejudice rather than on the evidence, himself introduces such prejudice, as was done here, his conduct "should be promptly rebuked, and . . . it is the imperative duty of a reviewing court to take care that wrong is not done in this way. . . ." *Reynolds* v. *United States*, 98 U.S. 145, 168 (1878).

Even if the Court of Appeals was correct in concluding "that the District Judge's greeting to his old friend was plainly not intended to sway the jury," its failure sufficiently to rebuke the judge and to take care that wrong has not been done bespeaks a tolerance of judicial misconduct which this Court should correct.

Recognizing, as the Court of Appeals apparently failed to do, the dual factors: that the judicial misconduct in this case sprang not from carelessness or inadvertence, but from a stubborn insistence upon a right to misbehave; and that the misconduct, although most obviously impinging on the verdict on Count 1, could also have affected the verdict on the other two counts, this Court should express an attitude less benign than that of the Court of Appeals. We submit that the Court should grant the writ here sought and should summarily reverse the convictions on all counts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 79-5298

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANCESCO MICHIENZI, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Ohio,

Decided and Filed September 12, 1980.

Before: EDWARDS, Chief Judge, KENNEDY, Circuit Judge, and PECK, Senior Circuit Judge.

PER CURIAM. Defendants appeal from their conviction after jury trial on three counts involving charges of mail fraud and making false statements, in violation of 18 U.S.C. §§1341, 1342 and 1001 (1976). The charges involve allegations that defendants had fraudulently obtained payment of Medicare and Medicaid funds.

While appellants contend that there was insufficient evidence to support the jury verdicts and complain about rulings on the part of the trial judge in this 12-day trial, our review of the record indicates that there was more than ample proof to sustain the jury verdicts on all three counts at issue here.

Our review also discloses no reversible error in the Judge's evidentiary rulings and no violation of the double jeopardy clause in the holding of a second trial after a

mistrial had been declared on motion of the defendants in the first trial.

The primary issue which concerned this court on appeal is stated thus in appellants' brief:

> At the conclusion of the government's direct examination of Edward Beier, a government witness, Judge Young arose from the bench, went over to the witness stand and conducted a conversation with the witness in the presence of the jury. When he returned to the bench, Judge Young addressed the jury, saying, "Mr. Beier and I are old friends from Norwalk." The following colloquy then took place between the Court and counsel (App. 727):
>
> MR. HOWELLS: May we approach the bench?
>
> THE COURT: You may.
>
> (Whereupon, the following discussion was held at the Bench.)
>
> MR. HOWELLS: Please let the record show that the Court rose, walked to the side of the Bench, shook hands with the witness, who rose and shook hands with the Court, and they addressed each other in a spoken way. Thank you.

It is clear to us that Mr. Beier's testimony was of great importance to the government's proofs in relation to count one of the indictment upon which defendants were convicted.

While we recognize that the District Judge's greeting to his old friend was plainly not intended to sway the jury, the episode may have lent undue weight to the testimony given by the witness involved. *See Quercia* v. *United States*, 289 U.S. 466, 470 (1933).

Under this circumstance, the judgment of conviction as to count one is vacated as to both defendants. The judgments of conviction on the other counts are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 79-5298

FILED
Oct 17 1980
John P. Hehman, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

FRANCESCO MICHIENZI, ET AL.,
Defendants-Appellants.

ORDER

Before: EDWARDS, Chief Judge, KENNEDY, Circuit Judge and PECK, Senior Circuit Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's order,

Now, therefore, the motion for rehearing is hereby denied.

Entered by order of the court

/s/ JOHN P. HEHMAN
Clerk